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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARCUS DELAINE DANDY, Defendant and Appellant.	A122415 (Contra Costa County Super. Ct. No. 050807503)

Defendant Marcus Delaine Dandy seeks reversal of the judgment of conviction for possession of certain illegal substances and drug paraphernalia, arguing that the trial court erred when it denied his motion to suppress evidence obtained when a police officer unlawfully detained him as he stood on a downtown sidewalk in Concord, California. We find defendant's encounter with the officer was consensual prior to the officer obtaining reasonable suspicion to detain him. Therefore, we affirm the judgment.

BACKGROUND

In January 2008, the Contra Costa County District Attorney filed a felony complaint charging defendant with felony possession of Clonazepam (Health & Safety Code, § 11375, subd. (a));[1] felony possession of methamphetamine (§ 11377, subd. (a)); misdemeanor possession of marijuana (§ 11357, subd. (b)); and misdemeanor possession of a smoking device (§ 11364).

[1] Further unspecified code references are to the Health and Safety Code.

Defendant's Motion to Suppress

In June 2008, defendant moved pursuant to Penal Code section 1538.5 to suppress the drug evidence found on his person, arguing that it was obtained in violation of his rights under the Fourth and Fourteenth Amendments of the United States Constitution. A magistrate conducted a combined preliminary hearing and suppression hearing.

The evidence presented at the hearing established that on November 10, 2007, between 10:00 and 10:40 a.m., a woman using an automatic teller machine (ATM) in downtown Concord thought she saw a man acting suspiciously there, surreptitiously watching people as they used the ATM. She called her husband, described her observations, and asked him to telephone the police. A short time later, a police dispatcher called the woman, who gave the dispatcher a physical description of the defendant and a very short explanation of why she was suspicious about his conduct.

Krieger's Testimony

Concord Police Corporal Jeff Krieger testified that at 10:24 a.m. on the day in question, he responded to a dispatch report of "a Black male who had very little hair . . . pretending to talk on a pay phone, and pretending to smoke a cigar near the ATM machine." He considered the ATM machine to be located in a high-crime area where offenses had occurred "ranging from people smoking marijuana in the area . . . all the way to street robberies, either armed or strong armed robberies." People had watched and robbed bank patrons as they came in and out of banks, and committed bank robberies in the area as well.

When Krieger arrived at the location "almost immediately" after receiving the dispatch report, he saw defendant, "a Black male with very little hair," smoking a cigar in the doorway of a coffee shop, about 40 feet from the ATM location on the corner. Krieger made a U-turn at the intersection and pulled his patrol car to the curb line. He activated his "emergency lights" because department policy required it, since he was "blocking the lane of traffic."

Krieger testified that he got out of the car and approached defendant, who was standing about 20 feet away on the sidewalk using a cell phone. Asked on cross-

examination, "And you told him to get off the cell phone when you approached him?," Krieger responded, "Yes." Krieger spoke in a "very low key, casual" voice and asked defendant if he had been standing at the pay phone or by the ATM. When defendant said that he had been at those locations, Krieger asked him if he had identification with him. Defendant produced his identification. Krieger did not tell defendant that he was under arrest or detained, and did not draw his gun.

When he was asked what happened next, Krieger testified that "[a]s I talked to [defendant], I could smell the odor of marijuana coming from his person." He started to ask defendant about the marijuana while checking for warrants. "[M]aybe two or three minutes" had passed since he had approached defendant. He asked defendant if he had anything illegal on him and, after defendant said no, if defendant had "even a little bit of weed." Defendant said he did have some "weed" and agreed to a search.

Krieger searched defendant, finding marijuana and pills that did not look like prescription medication. Krieger arrested defendant and, at a subsequent search at the jail, he found a glass pipe with a bubble end and residue that was consistent with methamphetamine and a small baggie of an off-white crystal substance that Krieger believed was methamphetamine.[2]

The Magistrate's Ruling

The magistrate held that the citizen report of defendant's activities did not provide Krieger with a reasonable suspicion sufficient to detain defendant. The magistrate further held that defendant was not detained before defendant revealed he possessed marijuana to Krieger, but instead had engaged with Krieger in a consensual encounter. He found that Krieger did not activate the emergency lights of his vehicle "for the purpose of detaining the defendant nor was the car positioned and the lights activated in such a way that somebody who might or might not have seen the lights—we don't know if the defendant

[2] At the hearing, the parties stipulated that the marijuana weighed 0.41 grams, the pills were Clonazepam, and the methamphetamine weighed 0.29 grams.

ever saw these lights—would have believed that the lights were there solely for the purpose of the police officer exercising authority to physically restrain that person." The magistrate also determined that Krieger's asking for an identification card was not a "restraint per se." The magistrate further found as follows:

"And the conversation concerning the cell phone while also perhaps in one interpretation looking at it might be an indicator of a detention, the clear fact remains that the defendant physically was not restrained. There is no indication that he—or there was any indication that he was free to comply or not comply with the officer's direction with respect to the cell phone, as easily interpretable from the circumstances, would be that the officer wants to talk to the defendant and obviously could not talk to the defendant while he was using the cell phone, so he was simply asking for the undivided attention of the defendant. Didn't pull out handcuffs. Didn't order him against the wall. Didn't put his hands on defendant. Didn't draw his weapon.

"So in this court's review, although it's—closer than some cases that I have seen, it's my view that this was a consensual encounter and not a detention, until it was clear to the officer that the defendant had provided information to the officer, including the aroma of marijuana that was on or about his person, and his verbal response that he had some marijuana on his person, that the officer acted upon and then detained the defendant.

"It's my view that the defendant was not detained until the officer was told by the defendant that there was marijuana on him. At that point, the officer probably had probable cause, less reasonable suspicion."

Defendant's Motion to Dismiss the Information

In June 2008, the Contra Costa County District Attorney filed an information charging defendant with felony possession of methamphetamine (§ 11377, subd. (a)); misdemeanor sale of Clonazepam (§ 11375, subd. (b)(1)); misdemeanor possession of a smoking device (§ 11364); and misdemeanor possession of marijuana (§ 11357, subd. (b)).

Defendant subsequently moved pursuant to Penal Code section 995 to dismiss the information, arguing that he was committed without probable cause based on evidence

seized in an unjustifiable, warrantless search and seizure in violation of the state and federal Constitutions. In denying defendant's Penal Code section 995 motion, the trial court found "that the magistrate was right. This is not a detention. It was a consensual encounter." Defendant then pled no contest to all counts. The trial court suspended imposition of sentence and placed defendant on probation for two years, subject to various terms and conditions. Defendant filed a timely notice of appeal.

DISCUSSION

On appeal, defendant argues that we must reverse the trial court because Krieger detained him in violation of his state and federal constitutional rights. Defendant contends that Krieger detained him when he approached him, told him to get off his phone, and asked him for his identification, but that there was not an objectively reasonable suspicion to detain him at that time. The People argue that Krieger had a reasonable suspicion sufficient to detain defendant as early as when he detected the aroma of marijuana coming from defendant's person, and that the two engaged in a consensual encounter up to that point. We agree with the People.

I. *Relevant Search and Seizure Law*

The Fourth Amendment of the federal Constitution requires state and federal courts to exclude evidence obtained from unreasonable government searches and seizures. (*People v. Williams* (1999) 20 Cal.4th 119, 125.) State and federal constitutional claims regarding the admissibility of evidence obtained by an allegedly improper search and seizure are reviewed under the same standard. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 76, overruled on another ground in *In re Jaime P.* (2006) 40 Cal.4th 128; *People v. Camacho* (2000) 23 Cal.4th 824, 829-830.) A warrantless search is presumed to be illegal. (*Mincey v. Arizona* (1978) 437 U.S. 385, 390.) The prosecution always has the burden of justifying a warrantless search or seizure by proving that it fell within a recognized exception to the warrant requirement. (*People v. Williams*, at p. 130; *In re Tyrell J.*, at p. 76.)

In *In re Manuel G.* (1997) 16 Cal.4th 805, our Supreme Court discussed the differences between consensual encounters and detentions:

"Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime. [Citation.] [¶] The United States Supreme Court has made it clear that a detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citation.] '[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled." (*In re Manuel G., supra*, 16 Cal.4th at p. 821.)

The test for the existence of a show of coercive authority is an objective one, and does not take into account the perceptions of the particular person involved. (*In re Manuel G., supra*, 16 Cal.4th at p. 821; *California v. Hodari D.* (1991) 499 U.S. 621, 628.) As one court has noted, "[i]t is not the nature of the question or request made by the authorities, but rather the manner or mode in which it is put to the citizen that guides us in deciding whether compliance was voluntary or not." (*People v. Franklin* (1987) 192 Cal.App.3d 935, 941.)

"Where a motion to suppress is submitted to the superior court on the preliminary hearing transcript, the appellate court disregards the findings of the superior court and reviews the determination of the magistrate who ruled on the motion to suppress, drawing

all presumptions in favor of the factual determinations of the magistrate, upholding the magistrate's express or implied findings if they are supported by substantial evidence, and measuring the facts as found by the trier against the constitutional standard of reasonableness." (*People v. Thompson* (1990) 221 Cal.App.3d 923, 940.)

We apply a mixed standard of review. We review the trial court's factual findings for substantial evidence (*People v. Wader* (1993) 5 Cal.4th 610, 640), and we do not question the trial court's judgments regarding witness credibility. (*People v. Ramos* (2004) 34 Cal.4th 494, 505.) However, "whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review." (*People v. Saunders* (2006) 38 Cal.4th. 1129, 1134.)

II. *Discussion*

Defendant contends that the following circumstances support his conclusion that a reasonable person would not consider themselves free to decline Krieger's requests or otherwise terminate the encounter as early as when Krieger told him to get off the phone:

"In addition to the fact that Officer Krieger gave [defendant] an order to 'get off the phone,' he also made a quick U-turn, got out of his car leaving it in a traffic lane with red lights blinking, approached 'immediately,' took and kept [defendant's] ID, and asked him if 'he had anything illegal,' purportedly after he smelled marijuana."

This summary is not entirely accurate, nor is it evidence that supports defendant's conclusion that Krieger unlawfully detained him, for several reasons. First, defendant's summary of events extends beyond when Krieger had sufficient reasonable suspicion to detain him. The trial court found that Krieger did not detain defendant until defendant revealed he possessed marijuana and, as we have mentioned, the People argue on appeal that Krieger developed this reasonable suspicion when he detected the aroma of marijuana coming from defendant's person. We agree with the People's assessment based on our independent research. It has been held that " 'the strong aroma of fresh marijuana' can establish probable cause to believe contraband is present." (*People v. Benjamin* (1999) 77 Cal.App.4th 264, 273; see also *People v. Cook* (1975) 13 Cal.3d 663, 668 [regarding unburned marijuana], disapproved on another ground as stated in *People*

v. Doolin (2009) 45 Cal.4th 390, 421, fn. 22; *United States v Gipp* (8th Cir. 1998) 147 F.3d 680, 685 [finding reasonable suspicion to investigate further when police officer smelled odor of marijuana coming from defendant's car].)

This leaves the question of when Krieger smelled the marijuana. This is not entirely clear from his testimony. As we have discussed, when asked what happened after he asked defendant for his identification, Krieger replied in part that "[a]s I talked to [defendant], I could smell the odor of marijuana coming from his person." He also testified that he started asking defendant about marijuana while he checked for warrants. We conclude from this testimony that Krieger detected the aroma of marijuana coming from defendant's person at least as early as when he received defendant's identification. For the sake of our discussion, we will assume this was the first time Krieger did so. Therefore, we must determine whether or not Krieger and defendant engaged in a consensual encounter only up to this time.[3] We turn now to defendant's contentions regarding these events.

Defendant mischaracterizes some of the initial events. He contends that Krieger approached him after making a "quick U-turn." However, Krieger testified only that he arrived at defendant's location "almost immediately" after receiving the dispatch report, made a U-turn at the intersection, and pulled his patrol car to the curb line. This merely suggests that he was in the immediate vicinity when he received the dispatch and promptly attended to it. There is no evidence that he proceeded at a pace faster than normal.

Also, defendant contends that Krieger left his car "in a traffic lane with red lights blinking." However, Krieger merely testified that he pulled up to the curb line about 20 feet from where defendant was standing, but parked so as to cause his vehicle to block a lane of traffic, and that he activated his "emergency lights" to notify vehicles of his

[3] Therefore, we do not further consider defendant's contention that Krieger kept defendant's identification as he searched for warrants, thereby restricting defendant's freedom to leave.

presence pursuant to department policy. There is no evidence that these emergency lights were red, blinking lights; indeed nothing indicates that these lights were other than the standard emergency lights available on the vehicle itself.

Considering the actual evidence, there are three reasons why Krieger's approach in his vehicle did not contribute to a show of authority that would cause a reasonable person to think that he or she was not free to decline Krieger's requests or terminate the encounter. First, given the downtown location and mid-morning time, it is reasonable to infer that there was significant vehicular traffic, parked cars, and a general level of activity that diluted any impact caused by Krieger's approach. Second, while Krieger put on his "emergency lights," he did so only in order to signal his presence in a lane of traffic to other vehicles, and not in a manner directed at defendant.[4] Third, that he pulled up his vehicle to the curb line 20 feet away from defendant also indicated a lack of urgency in his approach.

The evidence further indicates that Krieger's approach on foot was not intimidating or coercive in nature. Krieger indicated that he approached defendant alone without displaying his weapon, made no effort to touch defendant, did not tell him anything which indicated he was being detained, and spoke to him in a "very low key, casual" voice. Moreover, while there is no evidence about Krieger's walking gait, his testimony about the low key, casual nature of his voice suggests that his gait did not display any particular urgency.

Indeed, the nature of Krieger's overall approach was so unthreatening that it appears defendant continued to use his cell phone up until the time that Krieger "told" him to get off the phone. The fact that defendant continued to use his cell phone until that time indicates that Krieger's overall approach was not intimidating or, as the

[4] The case defendant cites to argue that Krieger's use of emergency lights contributed to his unlawful detention involved lights used in a traffic stop of a vehicle (see *People v. Bailey* (1985) 176 Cal.App.3d 402, 405-406), which is altogether different from the sidewalk encounter of a pedestrian that was involved here. Therefore, the case is inapposite.

magistrate suggested, that defendant was so positioned and in such a distracted state of mind (given his apparent engagement in a phone conversation) that he did not notice Krieger before speaking with him.

Thus we conclude that the evidence of Krieger's overall approach, if it were noticed by a reasonable person in defendant's position, might be seen as purposeful, but it would not be viewed as coercive, nor does it meaningfully contribute to an analysis that Krieger acted coercively based on the totality of the circumstances. A reasonable person would not conclude from it that he or she was restrained from disregarding Krieger's requests or terminating the encounter.

We now turn to Krieger's first words to defendant, which were words to the effect that he get off the cell phone. Krieger's affirmative reply to defense counsel's cross-examination question as to whether he "told" defendant to get off his cell phone is the only evidence that suggests Krieger expressed anything but questions to defendant before defendant admitted possessing marijuana. The record does not indicate exactly what Krieger said to defendant. It is not inconceivable that Krieger in fact asked defendant to end his telephone call. However, we are mindful that, as we have discussed, a warrantless search is presumed illegal and the prosecution bears the burden of justifying it. The prosecution having failed to establish that Krieger did anything other than "tell" defendant to get off his cell phone, we understand that Krieger did so.

Krieger's statement to get off the phone does not establish a temporary detention for two reasons. First, Krieger testified that he spoke to defendant in a low key, casual voice. This testimony provides substantial evidence to support the magistrate's finding that Krieger's statement was simply a request for defendant's undivided attention.

Second, we do not examine Krieger's statement in isolation, but instead consider the totality of the circumstances to determine whether an unlawful detention occurred. We have already examined the uncoercive nature of Krieger's approach. Moreover, Krieger testified that after he "told" defendant to get off the phone, he asked him, in a low key, casual voice, if he had been standing by the pay phone or ATM and, after

receiving an affirmative response, asked for defendant's identification. These were questions, not directives, and hardly evidence of Krieger's exercise of coercive authority.

Third, Krieger's statement to defendant to get off the phone was not an instruction to "stop," nor did it otherwise indicate that he remain in place, contrary to the directives given in the cases defendant cites. (See *People v. Jones* (1991) 228 Cal.App.3d 519, 523 [officer saying something like, " ' "Stop. Would you please stop. " ' "]; *People v. Verin* (1990) 220 Cal.App.3d 551, 554 [officer saying, " 'Hold it, Police,' " or " 'Hold on, Police' "]; *People v. Roth* (1990) 219 Cal.App.3d 211, 215, fn.3 [officer shining a spotlight on defendant and issuing a " 'command' " that defendant approach him].) In our independent research we have not found an instance in which a police officer approached an individual using a cell phone on a public sidewalk and sought to ask them questions. However, we think Krieger's statement to defendant to get off the phone is analogous to an officer knocking on the door of a private home and asking questions of the person answering the door. " 'Absent express orders from the person in possession against any possible trespass, there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's "castle" with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law.' [Citation.] This view ' "has now become a firmly-rooted notion in Fourth Amendment jurisprudence." ' " (*People v. Rivera* (2007) 41 Cal.4th 304, 309; see also *People v. Jenkins* (2004) 119 Cal.App.4th 368, 374 [reversing the trial court's determination that a "knock and talk" search procedure involving a motel room violated defendant's Fourth Amendment rights because "there is nothing in our constitutional jurisprudence that makes it illegal for police officers to knock on a person's door unless they first reasonably suspect the person has committed a crime"].) As with Krieger's statement to defendant to get off the cell phone, an officer's knock on the door arguably disturbs a person's privacy and could be viewed as something other than a request; however, the law is clear that by itself, it does not rise to the level of an investigatory detention and

must be evaluated within the totality of the circumstances. In the present case, doing so causes us to conclude that a reasonable person would consider themselves free to disregard Krieger's questions and terminate the encounter despite Krieger's statement to defendant in a low key, casual voice to get off the cell phone.

Krieger also asked defendant for his identification. As defendant concedes, however, an officer's request to see identification is not sufficient to establish a detention. (*People v. Castenada* (1995) 35 Cal.App.4th 1222, 1227; see also *Florida v. Bostick* (1991) 501 U.S. 429, 434 [an officer may ask to examine an individual's identification without necessarily conveying that compliance is required].)

Defendant argues that we should find that he was unlawfully detained based upon *People v. Garry* (2007) 156 Cal.App.4th 1100, issued by this court, because Krieger's conduct was so intimidating as to constitute an unlawful detention. In *Garry*, an officer patrolling late at night in a high-crime, high-drug area where street sales often occurred and police had been assaulted, observed Garry standing on a corner. (*Id*. at p. 1104.) The officer turned the patrol car's spotlight directly on Garry, exited his car, and walked "briskly" towards him, covering about 35 feet in two and a half to three seconds, while asking Garry to confirm his parole status and disregarding his assertion that he was merely standing outside his home. (*Ibid*.) After learning that Garry was on parole, the officer decided to detain him and, after Garry resisted detention, the officer arrested him and searched him, finding certain illegal substances. (*Ibid*.) We concluded that an unlawful detention had occurred because the officer's actions, "taken as a whole, would be very intimidating to any reasonable person" and that "only one conclusion is possible from this undisputed evidence: that [the officer's] actions constituted a show of authority so intimidating as to communicate to any reasonable person that he or she was ' "not free to decline [his] requests or otherwise terminate the encounter." ' " (*Id*. at pp. 1111-1112.) The differences between these facts and the present circumstances are obvious. Krieger did not shine a spotlight on defendant, rush towards him, demand to know his legal status, or otherwise take actions which suggested any effort to freeze defendant in his movements; to the contrary, his approach was not intimidating and his voice was low key

and casual. In short, there was nothing particularly intimidating about Krieger's actions, rendering *Garry* inapposite.

DISPOSITION

The judgment is affirmed.

_____
Lambden, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.